DRACO MINES, INC.

IBLA 82-1228 Decided August 26, 1983

Appeal from decision of the Colorado State Director, Bureau of Land Management, approving stipulations to open pit mining reclamation plan. CO-52-82-05P.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976:
Generally--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Surface Management.

BLM may properly condition the approval of a plan of operations for open pit mining on the acceptance of stipulations designed to prevent unnecessary and undue degradation of the public lands where such stipulations are reasonable and properly reflect considerations of the public interest. However, where the language of the stipulations does not accurately reflect the intent of the parties BLM should consider language modifications to answer legitimate concerns of the operator and incorporate the assurances given by BLM.

APPEARANCES: George A. Holcomb, vice president for Draco Mines, Inc.; Lowell L. Madsen, Esq., Office of the Regional Solicitor, United States Department of the Interior, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Draco Mines, Inc. (Draco), has appealed from a decision dated July 12, 1982, by the Colorado State Director, Bureau of Land Management (BLM), approving stipulations to appellant's plan of operations (plan) for the Crystal Hill project in Saguache County, Colorado.

Appellant's plan submitted to BLM on December 10, 1981, involves open pit mining, and a sodium cyanide leaching process for extracting gold in an 80-acre project area, approximately 50 acres of which are public lands in T. 43 N., R. 6 E., secs. 27 and 28, and T. 42 N., R. 6 E., sec. 2, New Mexico principal meridian.

An outline of events leading to the action which is being appealed is helpful in an attempt to understand the action of the State Director and subsequent appeal.

The property lies within the Crystal Hill Mining District along the northwestern margin of the San Luis Basin, in south-central Saguache County, Colorado. The property in question consists of a group of patented lode mining claims leased to Draco and a group of unpatented lode mining claims owned by Draco. Draco owns or controls all claims in the area except three patented claims which are owned by others and not controlled by Draco. Mining activities had taken place in the area and an open pit was excavated at the site of the presently proposed pit during the 1940's.

Draco acquired its interest and began an examination of the property in 1975. In 1980 Draco constructed a pilot mill on a 3-acre site a short distance from the patented claims. Following examination and testing Draco drafted and submitted a proposed plan to BLM pursuant to 43 CFR 3809. This plan was dated December 4, 1981, but was received by BLM on December 10, 1981. While the date of filing is not clear, in the same general time frame Draco had submitted its plan for approval by the Colorado State Mineral Land Reclamation Board (CSMLRB).

On December 16, 1981, the District Manager responded with a three page letter outlining additional information which would be required in order to allow BLM to conduct an adequate assessment of the proposed operations.

Draco submitted additional information on December 23, 1981, in response to the December 16, 1981, request. The letter of December 23 was received on December 28, 1981, and acknowledged on January 5, 1982. At this time the tenor of the correspondence indicates a high degree of cooperation between the parties.

BLM conducted an environmental assessment (CO-050-82-SL-16) and determined that appellant's plan, as amended by the December 23, 1981, letter and a February 10, 1982, notice, 1/ did not fully address all impacts which could result from the proposed operation. In order to ensure a more comprehensive mitigation of impacts and to better define reclamation proposals, BLM developed a number of stipulations. By letter dated February 24, 1982, the Area Manager approved appellant's plan, as amended, subject to 27 stipulations which were set out in the Area Manager's letter.

On March 10, 1982, Draco requested five items of additional information, which it deemed necessary, in order to respond to the February 24, 1982, letter by BLM. Following response, which is not found in the file, Draco commented on the 27 stipulations imposed by BLM. 2/ By letter dated April 12,

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1/ This notice was given pursuant to 43 CFR 3809.1-3 regarding proposed disturbance of less than 5 acres to conduct interim onsite testing. We note that the interim work was found to be not acceptable, and that the proposal for interim work was interpreted to be a submission of a modified plan.

2/ Stipulations 1, 4, 7, 8, 23, 24, and 26 were accepted without comment. Comments of concern or proposals regarding how the stipulations would be carried out were submitted with respect to stipulations 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, and 27.

1982, BLM answered each of the Draco concerns. 3/ In its April 30, 1982, response Draco noted that, based upon the explanations, assurances, and modifications found in the April 12 letter, it found 21 of the 27 stipulations to be acceptable. In addition, Draco outlined its concerns with respect to the remaining six stipulations. 4/ On May 6, 1982, BLM acknowledged agreement on all but six of the stipulations. We conclude and find that the exchange of letters and statements therein, not objected to, are the agreement of the parties with respect to the 21 stipulations not mentioned in the May 6, 1982, letter.

On May 11, 1982, Draco gave "formal appeal" by letter addressed to the area manager. Subsequently, BLM issued a "Notice of District Manager's Decision," dated May 18, 1982, which acknowledged the appeal and gave reasons for the stipulations objected to by Draco. A second "formal appeal," based upon the May 18 letter, was filed with the BLM State Director on June 10, 1982. On July 12, 1982, a decision was issued by the State Director denying the appeal of Draco. On August 2, 1982, Draco notified the State Director that it again desired to appeal, making inquiry as to where to send the appeal. On August 19, 1982, the appeal received on August 12, was forwarded to this Board. 5/ Statements of reasons and an answer were subsequently filed.

This is a classical case of negotiations which have broken down. A working relationship which began on a plane which demonstrated a sincere desire on the part of both appellant and BLM to balance conflicting interests has now degenerated to the point where each party is accusing the other of

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3/ The reasoning behind the stipulations was outlined. An explanation was given regarding flexibility being given to the authorized officer regarding stipulations 5, 6, 9, 10, 12, 13, 15, 18, 21, and 27. Proposals were made by Draco with respect to stipulations 17 and 18.

4/ Again, Draco stated why it then found certain stipulations, which were previously questioned, to be acceptable. At this point Draco accepted stipulations 1 through 9, 16 through 19, and 23 through 27. Draco made conditional acceptance of stipulations 15 and 21, and disagreed with stipulations 10, 11, 13, 14, 20, and 22. Stipulation 12 was not mentioned.

5/ We note that 43 CFR 3809.4(a) of the regulations relating to surface management provides the following procedure for appeals:

"Any operator adversely affected by a decision of the authorized officer made pursuant to the provisions of this subpart shall have a right of appeal to the State Director, and thereafter to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to Part 4 of this title, if the State Director's decision is adverse to the appellant."

"Authorized officer" is defined in 43 CFR 3809.0-5 as "any employee of the Bureau of Land Management to whom has been delegated the authority to perform the duties described in this subpart." It would appear from the record in this case that the San Luis Resource Manager was the authorized officer in charge of reviewing the plan in question. Therefore, Draco's "formal appeal" dated May 11, 1982, which sought review of the Area Manager's determination on the six stipulations should have been acted upon by the State Director, rather than the District Manager. BLM imposed a level of review in this case which was not contemplated by the regulations.

always having had an arbitrary unwillingness to recognize the responsibilities and goals of the other.

The six stipulations which are the subject of this appeal were originally proposed as follows:

10. Final surface grade of the heap leach operations area, the sand/gravel pit, the crusher site, and the waste dump will be recontoured to a shape acceptable to the Authorized Officer and consistent with surrounding topography. Maximum slope of the heap leach operations area will be 3:1.

11. Final surface grade of all roads and trails will be contoured to approximate their original condition to the extent possible. Roads or trails crossing slopes determined by the Authorized Officer to be too steep to be reworked safely will be rounded as much as possible on the outside edge and the entire area ripped to a minimum depth of 1 foot. All roads or trails will be securely blocked to prevent vehicular access as directed by the Authorized Officer.

13. Terraces/benches will be constructed on all slopes in the sand/gravel pit, the crusher site and the waste dump. Terraces will be a minimum width of 10 feet, slope 1 to 2 percent for drainage, be inclined 1 to 2 feet toward the inside and extend into natural drainage patterns or into natural vegetation to prevent erosion. Maximum distance between terraces should be 25 feet.

14. Turnouts and/or waterbars will be constructed on all recontoured/abandoned roads and trails within the project area. Structures should slope 1 to 2 percent, have 1-1/2 to 2 feet free board and extend into natural drainage patterns or into natural vegetation to prevent erosion. Maximum spacing between structures should follow the following schedule:

0 to 2 percent grade	200 feet
2 to 4 percent grade	100 feet
4 to 5 percent grade	75 feet
5+ percent grade	50 feet

20. Equipment utilized in rehabilitation operations will work all slopes on the contour. Traversing slopes from bottom to top will be allowed at a single access point to be determined by the Authorized Officer.

22. The archaeological site, known as 5 SH 854, located in the path of the haul road, will be buried and maintained with 3 feet of material by the operator. As in stipulation 1, the road area must be clearly flagged or staked by the operator and then must be approved by the Authorized Officer. Forty-eight hours notice must be given prior to the beginning of the flagging/staking and prior to the beginning of the burial and road construction. An archaeologist and the Authorized Officer or his representative must be present during the burial of the site, as well as during road construction within the saddle.

[1] The regulations cited by BLM (43 CFR Subpart 3809, Surface Management) derive their authority in part from sections 302, 303, and 603 of

the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732, 1733, 1782 (1976), which require the Secretary to take any action, by regulation or otherwise, to prevent unnecessary or undue degradation of the Federal lands and provide enforcement of those regulations.

Generally pertinent to this appeal is 43 CFR 3809.2-1, which provides in part:

> § 3809.2-1 Environmental assessment.
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> (a) When an operator files a plan of operations or a significant modification which encompasses land not previously covered by an approved plan, the authorized officer shall make an environmental assessment or a supplement thereto to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required.
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> (b) In conjunction with the operator, the authorized officer shall use the environmental assessment to determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land. If an operator advises the authorized officer that he/she is unable to prepare mitigating measures, the authorized officer, in conjunction with the operator, shall use the environmental assessment as a basis for assisting the operator in developing such measures.

The regulation concerning access, 43 CFR 3809.3-3, is particularly relevant to stipulation 11. It provides:

> § 3809.3-3 Access.
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> (a) An operator is entitled to access to his operations consistent with provisions of the mining laws.
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> (b) Where a notice or a plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and, if practicable, to construct access roads within a designated transportation or utility corridor. When commercial hauling is involved and the use of an existing road is required, the authorized officer may require the operator to make appropriate arrangements for use and maintenance.

BLM's imposition of protective stipulations as prerequisites to oil and gas and geothermal leasing has often been reviewed by the Board. Such stipulations have been upheld where the records showed that they were the result of a reasoned analysis of all pertinent factors with due regard for the public interest and reflected a reasonable means to accomplish a proper Departmental purpose. James M. Chudnow, 67 IBLA 360, 362 (1982); Earth Power Corp., 55 IBLA 249, 88 I.D. 609 (1981).

Stipulations 10, 11, 14, and 20.

An analysis of the correspondence and pleadings shows that with respect to stipulations 10, 11, 14, and 20 the position of BLM is that, because of necessary vagueness of the plan as submitted by Draco or unknown factors, the stipulations must contain provisions giving the Authorized Officer authority to determine the acceptability of the work at a future date. On the other hand, Draco appreciates the assurances that BLM will not be unreasonable but seeks more specific guidelines incorporated in the stipulations which would give Draco "something they can rely on." Draco's objections to these stipulations generally goes not to error on the part of BLM in formulating the stipulations or an arbitrary insistence that they be incorporated in the mining plan, but is directed to its concern that the stipulation language is so vague as to lead to arbitrary enforcement, with the resulting inability to budget for the anticipated expense. We find the basis for these stipulations to be reasoned and, in light of the explanations given to Draco subsequent to the February 24, 1982, BLM letter, generally reflective of a reasonable means to accomplish the proper Departmental purpose. However, the record clearly reflects the fact that BLM has recognized Draco's concern with respect to the possibility of arbitrary application of the provisions. This recognition should have been incorporated in the stipulations. 6/

6/ Rewritten stipulations 10, 14, and 20 reflective of statements and assurances made by BLM and Draco in their correspondence could be stated in language similar to the following:

10. Upon completion of the operations contemplated by mining plan, final surface grade of those portions of the heap leach operations area, the sand/gravel pit, the crusher site, and the waste dump located upon lands subject to the jurisdiction of BLM (unpatented claims) and disturbed during the operations will be recontoured to a shape consistent with the surrounding topography. Recognizing that the final shape and size of the disturbed areas will be dependent upon the amount of materials removed and/or deposited, such recontouring shall be conducted in a manner satisfactory to the Authorized Officer. Unless otherwise stated, in writing, maximum slope in the heap leach operations area shall be not greater than 3:1.

14. Turnouts and/or waterbars will be constructed on all recontoured roads and ways within the project area which are abandoned pursuant to stipulation 11. Structures should slope 1 to 2 percent, have 1-1/2 to 2 feet free board and extend into natural drainage patterns or into natural vegetation to prevent erosion. Maximum spacing between structures should follow the following schedule: 0 to 2 percent grade, 200 feet; 2 to 4 percent grade, 100 feet; 4 to 5 percent grade, 75 feet; 5+ percent grade, 50 feet. Greater spacing intervals will be permitted in those areas in which the authorized officer finds that ground conditions would not permit the above spacing or that structures at the specified intervals would not serve the intended purpose.

20. In order to prevent crawler tractor and other heavy equipment from making erosion channels up and down the hills to be rehabilitated, whenever deemed necessary by the Authorized Officer, reshaping and further activities conducted subsequent to initial reshaping will be carried out on the contour. Traversing slopes from bottom to top for the purposes contemplated in this paragraph will be allowed only at such point or points designated by the Authorized Officer.

By way of illustrative example, stipulation 11 (which is quoted in its entirety above) provides that "[f]inal surface grade of all roads and trails will be contoured * * *." In its initial response Draco asked BLM to specify the method of rehabilitation in order that "more reliable reclamation costs can be obtained" and described a road considered by Draco to be an access road which "should be left intact for future activities." BLM replied to Draco expressing concern that if the roads were abandoned they would inevitably erode, resulting in loss of top soil and severe gullying. The BLM reply then outlined what work was intended. Draco's subsequent response was that it had no problem with reclamation of abandoned roads but, as those being constructed are constructed pursuant to BLM rules and provision was made for erosion control, Draco did not find it responsive to insist upon reclamation of roads which were not to be abandoned upon completion of the mine plan but which were to be used for subsequent access to the property. After the subsequent exchange of letters, the BLM opinion stated:

> Stipulation 11: The BLM is precluded from denying access across public lands to Draco's patented or unpatented mining claims. We have no intention of closing all of the access roads upon completion of your operations in this area. However, upon completion of your operations, as set forth in the plan, all roads not required for access to your patented or unpatented mining claims will be closed, obliterated and restored for other resource use. This stipulation remains as written. [Emphasis added.]

Stipulation 11 states that all roads will be recontoured.

Draco has expressed concern regarding the provision in the stipulations that certain of the work be found acceptable to the Authorized Officer. We would remind Draco that, even if the mine plan had been accepted by BLM, the work performed would have been subject to approval by the Authorized Officer. 43 CFR 3809.1-9(f) provides that when "the reclamation has been completed in accordance with the approved plan * * * the authorized officer shall promptly inspect * * * [t]hen notify the operator, in writing, whether the reclamation is acceptable." Therefore, Draco is subject to the inspection and approval by an Authorized Officer, even if no stipulations had been made. However, Draco's concern is not entirely without merit. By 43 CFR 3809.1-9(f) the Authorized Officer is bound by the terms and conditions of the "approved plan" and could not demand that major activities not contemplated in the plan be carried out prior to approval. In the present case, the plan is made subject to the stipulations. Therefore, if the Authorized Officer were to withhold approval, based strictly on the wording of the stipulation, technically he would not be bound by any of the provisions of the plan. Under the circumstances, a concise statement of intent and purpose contained in the stipulation would be warranted. 7/

7/ Rewritten stipulation 11 could be stated in language similar to the following:

11. Upon completion of the operations contemplated by the mining plan surface grade of all roads and ways constructed and/or maintained by Draco in conjunction with its mining operations will be contoured to approximate their

Stipulation 13.

Appellant finds stipulation 13 objectionable in two respects. The first is the vagueness of the wording and the second is the 25-foot minimum distance between benches. With respect to vagueness we find, as we did above, that the basis for this stipulation is reasoned, and when taken together with the subsequent explanations, the stipulation is reflective of a reasonable means to accomplish the proper Departmental purpose. However, the 25-foot minimum distance is troublesome because the record indicates that BLM did not examine all of the facts when making the determination that a 25-foot minimum verticle distance between benches was appropriate with respect to the waste dump. Draco calculated the estimated size of the waste dump based upon 40-foot benches, but did not note this fact in its mine plan. BLM determined that 25-foot benches would be appropriate for restoration of the slope to near natural appearance. Because of Draco's failure to clearly state the bench height it had used, BLM had no way of determining that, by using a 25-foot bench height, the anticipated area disturbed by the waste dumps would be doubled. While on appeal appellant does not express serious objections to provisions of stipulation 13, other than the bench height, if at all possible, the bench height on BLM supervised lands should be determined prior to the time Draco begins placing waste on these lands, as the bench height will have direct impact upon the mining operations. 8/ In addition, a determination that a bench height other than 40 feet will be required will necessitate an amendment to the mining plan submitted to and approved by CSMLRB. 9/ On

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fn. 7 (continued)
original condition to the extent possible. Roads or ways crossing slopes determined by the authorized officer to be too steep to be reworked safely will be rounded as much as possible on the outside edge. Wherever possible roadside berms will be removed and the material therefrom spread onto the road next to the hillside. The roads so abandoned will be ripped to a minimum depth of 1 foot, seeded, and/or water barred in such place or places that the authorized officer deems to be necessary to prevent unnecessary or undue degradation. All roads or trails abandoned hereunder will be securely blocked in a manner acceptable to the Authorized Officer to prevent vehicular access. It is not intended that this stipulation will be enforced in a manner that will deny Draco, or its assigns, access to the patented or unpatented claims. If, at the time of completion, there is any disagreement with respect to what roads are to remain open Draco may designate such roads it deems needed and shall commit to maintenance thereof. If BLM deems it necessary or appropriate, it may require a bond to assure maintenance and ultimate contouring upon abandonment of the roads so chosen by Draco, or any part of them.

8/ The most efficient mining operation will be achieved if Draco will be able to place the material removed from the pit site in the waste dump area in a manner which will allow them to subsequently do rehabilitation by moving a minimum amount of waste a second time.

9/ We do not believe that Draco can realize much comfort from the statement in the July 12, 1982, State Director's decision that "the record confirms the fact that the bench height of the waste dump has been discussed with the personnel of the Colorado Mined Land Reclamation Board" and that 25-foot bench spacing is not "inconsistent with the plan submitted to and approved by the Board." The June 8, 1982, letter from CMLRB to BLM states:

[*286] remand BLM should weigh the adverse impact of the increased size of the waste dump against any adverse impact of a lesser restoration to natural appearance, and determine if modification of the bench height is called for. 10/

Stipulation 22.

The record is incomplete with respect to Draco's objection to stipulation 22. We note that a map designating the location and size of the archaeological site known as 5 SH 854 was sent to Draco by BLM. However, no map is in the file. After weighing Draco's objection to the stipulations we believe that a determination can be made without the map, as Draco did not object to stipulation 22 based upon the designation encompassing an unreasonably large area or private lands. However, lacking this information we must base our determination upon the assumption that stipulation 22 will apply only to that portion of site 5 SH 854 which will be disturbed. In light of these "reservations," we find that appellant's objections to stipulation 22, as that stipulation is amended by subsequent correspondence, are without merit. 11/ Its challenge to the archaeological site protection and/or evaluation measures imposed is unsupported. BLM is obligated by statutes and regulations to protect cultural resources on public lands.

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fn. 9 (continued)

"I have reviewed the list of twenty-eight stipulation proposals your staff provided me in February and have prepared the attached list of comments which are numbered to correspond with your stipulation proposals. There are several areas I have noted when the proposed stipulation would conflict with the MLRB-approved mining and reclamation plan, but not with the statutory requirments of MLRA. Acceptance of these stipulations would require amendment of MLRB-approved plans."

10/ Stipulation 13 could be rewritten in language similar to the following in order to reflect the intent of BLM in enforcing this provision:

13. Upon completion of the operations contemplated by the mining plan, or such sooner times as may be agreed upon, terraces/benches will be constructed on all slopes in that portion of the sand/gravel pit disturbed by the operator, and those portions of the crusher site and waste dump located upon lands subject to the jurisdiction of the BLM (unpatented claims). Recognizing that the final shape and size of the disturbed areas will be dependent upon the amount of material removed and/or deposited, the final placement of terraces/benches will be subject to approval by the Authorized Officer. Unless otherwise determined by the Authorized Officer at the time of terracing/benching, terraces will have a minimum width of 10 feet, be sloped 1 to 2 percent for drainage, be inclined 1 to 2 feet toward the inside and extend to natural drainage patterns or into natural vegetation to prevent erosion. The vertical distance between terraces will be determined by the Authorized Officer at the time of construction but will not be less than __ feet.

11/ The State Director's decision discussed the three alternative measures Draco could take to protect Archaeological Site 5 SH 854, and noted that the most preferable method would be to adjust the location of the road. Following this discussion the State Director concluded that Draco's appeal was denied. Strictly speaking, acceptance of the stipulation as written could deny Draco two of the three alternatives, including the one most preferred by BLM.

Conclusion.

We conclude that, while appellant has demonstrated no arbitrary action or abuse of discretion on the part of BLM in the formulation of any of the stipulations appealed herein, the language of the stipulations should be modified. The stipulations are a reasonable exercise of BLM's authority for the purpose of preventing undue degradation of the public lands. However, as written, the stipulations do not accurately reflect BLM's intent, and a firm insistence upon the language, as written, is arbitrary, especially in light of the fact that BLM recognizes that, as written, the stipulations could lead to arbitrary enforcement.

As the full impact of requiring 25-foot bench heights does not appear to have been considered, BLM should reassess the impact of this requirement in light of the marked increase surface area which would be disturbed if 25-foot benches are required. The adverse impact of the increased waste dump size should be weighed against any adverse impact of a lesser restoration to natural appearance and a determination made as to whether a modification of the bench height requirement is warranted.

With respect to stipulation 22 regarding the archaeological site, we conclude that the stipulation is reasonable. However, BLM may desire to allow Draco the option to choose one of the three proposed alternatives, either in the form of a stipulation allowing three courses of action or in the form of three alternative stipulations from which Draco could elect to choose.

We conclude further that there is no support in the record for appellant's charge that it was unfairly treated by BLM or BLM's charge that appellant had the attitude that BLM should accept appellant's plan as originally submitted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and remanded for further action consistent with this decision.

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R. W. Mullen
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Bruce R. Harris
Administrative Judge